apart from there being an objection against its admissibility in the trial itself in a trial within a trial.

There are instances where an accused person in the hearing against him when a cautioned statement is being introduced in a trial within a trial alleges that he had earlier made complaints of police assault to the Magistrate before whom he was produced and that the Magistrate informed him to make the complaint during the hearing of the case itself or that he alleges that the Magistrate has done nothing about his complaint. The prosecuting officer would also at times in the trial within the trial cross-examine the accused whether he has made a complaint of police assault, if there is such allegation, before the Magistrate at the time when the accused was produced for remand. The accused would reply in the same manner in that he did make the complaint and that the Magistrate advised him to bring out the matter in the trial itself or that the Magistrate did nothing about it. The position is unsatisfactory. The court in trying the case is placed in a difficult spot. Truth cannot be easily ascertained unless the Magistrate concerned is called as a witness and again he may have forgotten whether or not the accused had made such complaint.

The law provides a procedure as to what to be done in such cases and a complainant should not be deprived of his rights. I suggest in such cases the Magistrate should adopt the following procedure:

(a) If the complaint is made in writing then proceed to take cognizance if warranted and proceed as under sections 136 and 137 of the Criminal Procedure Code;

(b) If the complainant makes an oral complaint either in open court or in chambers, then if the Magistrate is not having other important or urgent matter then proceed to hear the complaint and take cognizance if needs be. Otherwise request the complainant to make a written complaint and thereafter proceed as under (a) above;

(c) If the oral complaint is made by a person who is being produced before the Magistrate for remand or for an extension of remand, where there is difficulty in filing a written complaint and where there is allegation of police assault, then the Magistrate should proceed to hear the complaint straight-away if he is free and if he is not free then fix another earliest available date to hear the complaint. The Magistrate may advise the complainant to lodge a police report if he has not done so and order that the complainant be medically examined if there is an allegation of assault. If there is any difficulty of getting an early date of hearing, the Magistrate should consult the President Sessions Court with a view of getting another Magistrate to hear the complaint;

(d) In a case where there is allegation of police assault connected with a cautioned statement made by the complainant, the case should be heard earlier than the one which the complainant is himself charged with;

(e) If the complainant makes the complaint at the beginning of the hearing of the case in which the complainant is an accused person then preferably the Magistrate should not take cognizance of the complaint as in not making the complaint earlier, the complainant obviously seeks to delay the trial. The complainant can nevertheless file the complaint even after the criminal case against him has been completed.

It should, however, be noted that an accused person alleged to have been assaulted as a result of which a cautioned statement was given has a discretion whether or not to make a complaint before the Magistrate under section 133 of the Criminal Procedure Code as the position will be by becoming a prosecutor he would have to prove his case beyond any reasonable doubt whereas in a trial within a trial he may only create a reasonable doubt in order to succeed. For this reason I see no real purpose for a prosecuting officer in the case against the accused to cross-examine the accused whether he has made a complaint before the Magistrate, because even if he has not made such complaint this is not any indication that there is no such assault if there is indeed one.

It is hoped with the above procedure there will be no uncertainty as to what to be done by the Magistrates when confronted with such cases. In having a fixed procedure as to what should be done will dispel the allegations that the Magistrate has refused to hear a complainant at the trial against him later.

In the circumstances in the instant case, I dismiss the appellant's appeal against the refusal of the learned President in not taking cognizance of the complaint by the appellant under section 133 of the Criminal Procedure Code.

Appeal dismissed.

Solicitors: *Dato Wrigglesworth & Co.*

ABDUL MAHMUD v. PUBLIC PROSECUTOR

[R.Cr.J. (Syed Agil Barakbah J.) February 11, 1980]
[Alor Star — Kedah Criminal Revision No. 4 of 1980]

Criminal Law and Procedure — Procedure in determining whether cautioned statement is voluntary — Criminal Procedure Code (F.M.S. Cap. 6), s. 113.

In this case the learned Magistrate held a trial within a trial to determine the voluntariness of a cautioned statement. The learned Magistrate called the accused first to give evidence and thereafter the prosecution witness concerned. Thereafter he made a finding that the cautioned statement was voluntarily made and admitted it in evidence.

Held: the learned Magistrate in this case had adopted the wrong principle and the wrong procedure. It is for the prosecution to establish the voluntariness of the cautioned statement and therefore the prosecution should begin. The accused would be entitled to cross-examine the prosecution witnesses and thereafter to give evidence in support of his objection. At the close of the case, the Court then makes a decision whether the cautioned statement was made voluntarily or not.

CRIMINAL REVISION.

Syed Agil Barakbah J.: My attention has been drawn to this case which was heard by the learned Magistrate, Jitra on the 27th of November 1979. The accused was convicted under section 379 of the Penal Code, and sentenced to one year imprisonment after

his defence was called. He has not lodged an appeal and the defence counsel in his letter to me confirmed that he did not wish to do so.

The real issue which is of importance in this case relates to the procedure adopted by the learned Magistrate in the course of determining the voluntariness of a cautioned statement of the accused in a trial within a trial. The statement was recorded by a Police Inspector, the officer who investigated the case, under section 113 of the Criminal Procedure Code. In determining the voluntariness of the cautioned statement the admissibility of which was challenged by the defence, the Magistrate called the accused first to give evidence and thereafter the prosecution witness concerned. Thereafter he made a finding that the cautioned statement was voluntarily made and admitted it as evidence.

No ground was given but in the circumstances it is safe to imply that the learned Magistrate was under the impression that the onus is on the defence to prove that the said statement was not made by the accused voluntarily. To my mind the learned Magistrate adopted the wrong principle. It is settled law that the question of voluntariness of such a statement lies upon the prosecution to establish. The trial is still in the prosecution stage. The duty is not for the accused to negative it. On the contrary, it is the duty of the prosecution to prove the statement is a voluntary one in the sense that it has not been obtained from the accused either by any threat or inducement or with hope of getting an advantage on a promise held out by a person in authority. Before putting the statement in, the prosecution has to satisfy itself thereon and adduce evidence in support thereof. The accused is entitled to cross-examination and thereafter to give evidence in support of his objection. Similarly the prosecution is also entitled to cross-examine the accused and his witnesses, if any. At the close of the case, the court has to make a decision whether the statement was made voluntarily or otherwise.

I trust the procedure stated above should be followed in future cases where a similar situation arises. Since the wrong procedure adopted by the learned Magistrate has not affected the decision in any way, there being other evidence to uphold the conviction and in the absence of any appeal both the conviction and sentence are not disturbed and are hereby confirmed.

Order accordingly.

PUBLIC PROSECUTOR v. MOHTAR BIN ABDUL LATIFF

[R.Cr.J. (Harun J.) February 20, 1980]

[Kuala Lumpur — Federal Territory Criminal Revision No. 5 of 1980]

Criminal Law and Procedure — Trial — Date of trial — To be fixed at convenience of court — Duties of counsel — Legal Profession (Practice and Etiquette) Rules, 1978, rr. 2 6 & 24 — Legal Profession Act, 1976, s. 77(3).

Legal Profession — Duties of counsel — Legal Profession (Practice and Etiquette) Rules, 1978, rr. 2, 6 & 24 — Legal Profession Act, 1976, s. 77(3).

In this case the accused was alleged to have committed criminal breach of trust. He originally pleaded guilty but was subsequently allowed to withdraw his plea. The hearing was fixed for October 4, 1979 in the presence of counsel. Subsequently counsel applied successfully for the postponement of the trial to February 4, 1980 and then to September 9, 1980, as he claimed to be engaged in other courts. The records were called on revision.

Held: (1) the general rule is that trial dates are fixed at the convenience of the court on a first come-first served basis;

(2) in this case counsel had no good or cogent reasons to apply for postponement and when the dates for trial were fixed he should not have accepted briefs which clashed with the trial date of the case;

(3) the case should be fixed for trial on an early date.

[Editorial Note: See Registrar's Circular No. (U) 3 of 1980.]

CRIMINAL REVISION.

J.L. O'Hara (Deputy Public Prosecutor) for the Public Prosecutor.

Manjeet Singh for the respondent.

Harun J.: In this case, the accused is alleged to have committed criminal breach of trust of an assortment of household appliances worth more than $20,000 from the Police Co-operative in 1976. The complaint was made in May 1977 and the accused was charged in court in July 1978. He claimed trial and hearing was fixed for January 23, 1979. When the case came up for trial on that day the accused pleaded guilty to the charge but the prosecuting officer said he did not have the facts of case with him and so the hearing was adjourned to February 2, 1979 for facts and sentence.

When the case came up again, the accused had the assistance of counsel but the prosecuting officer said he needed a longer date as there were many documents and receipts to be traced. In short, the investigation had not been completed.

Further hearing was fixed for April 7, 1979 but on that day counsel was not present when the case was called. The accused still maintained his plea of guilty. The hearing was adjourned to April 9, 1979 when the accused retracted his plea of guilty, whereupon the hearing was adjourned to October 4, 1979 in the presence of counsel. On September 22, 1979 counsel wrote to the court stating that he would not be able to attend court on October 4, 1979 as he will be engaged in the Industrial Court. He gave his free dates. The court, in order to accommodate counsel, postponed the case to February 4, 1980, being one of counsel's free dates. On February 2, 1980, counsel wrote in again stating that he would not be free on February 4, 1980 as he will be engaged in the Kelang Magistrate's Court on that day. He asked for another date, this time his earliest available date being September 1980. The court obliged and set hearing for September 9 & 10, 1980.

I called for the records of this case, as it appeared to me that it was an unduly long postponement when that particular court had hearing dates available in February and March this year. In fact that court was specially established this year to dispose of this type of cases expeditiously.

In any criminal trial, there are three parties, the court, the prosecution and the defence. If dates of